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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

APPELLANTS' REPLY TO MOTIONS TO AFFIRM

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Of the two Motions to Affirm, that of the United States and the Commission is especially notable, for it serves to underscore the importance of the questions of statutory interpretation presented by this appeal. REA and Greyhound are content to rest upon the lower court's theory that the issues raised by appellants were "premature" until the expiration of Greyhound's 60-day stock purchase offer. The United States and the Commission, however, evidently perceive one of the principal flaws in this simplistic approach: Since appellants cannot bring a private Clayton Act injunction suit, how could they raise the section 7 issue at the expiration of the Greyhound offer if this Court were to affirm the Commission's section 20a(2) order?

The United States and the Commission propose a two-step response. First, appellants have no cause to complain

about the section 20a(2) order, because that section requires only that the Commission consider the fiscal aspects of a proposed transaction regardless of its possible anticompetitive impact. Second, affirmance by this Court—whether on the basis of a restrictive reading of section 20a(2) or on the "prematurity" rationale—would not foreclose appellants from securing relief against a section 7 violation, because appellants would retain the right to petition the Commission for a section 5 hearing at the termination of the 60-day offer, and it "seems likely that a measure of inter-carrier influence sufficient to involve an undue restraint on competition would also involve sufficient control to invoke Section 5" (p. 12). In other words, it "seems likely" that there could not be a violation of section 7 of the Clayton Act absent an acquisition of control requiring a proceeding under section 5 of the Interstate Commerce Act, and in consequence the appellants' interests will be adequately safeguarded by the availability of relief under section 5 in the event this Court affirms the denial of relief in the case at bar.

This attempt to salvage the Commission's order underscores the applicability of the rule of *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 94, which was designed in large measure to foreclose a defense of an agency order newly devised in the office of appellate counsel. But more important is the consideration that, in mounting such a defense in this case, appellate counsel have introduced two additional issues of statutory construction that are of considerable significance—the relationship between sections 5 and 7 and the scope of section 20a(2). We show below that the Government's truncated reading of the "public interest" and "lawful object" standards of section 20a(2)—which was urged in the lower court by REA but not by the Government and which was not accepted by that court—

is untenable. We show also that the Government's contention respecting the relationship between the section 7 and section 5 standards—which has never to this point been advanced in this proceeding by anyone—is insupportable. In short, the United States was correct in urging before the Commission the necessity of deciding the section 7 question; it is incorrect in urging this Court summarily to sanction the Commission's avoidance of that question.

1. *Scope of section 20(a)2.* As the Government has recast the case,[1] the threshold issue is the scope of section 20(a)2. If under that provision the Commission may scrutinize only the fiscal soundness of a proposed transaction, the effort of the lower court to identify the factual circumstances justifying the Commission's refusal to consider the section 7 and section 5 issues was quite beside the point —the justification is the limited reach of the statute, not the uncertainties created by the 60-day Greyhound offer.

This question of statutory construction was thoroughly canvassed in the lower court. There REA maintained that section 20a was designed only to "eliminate unsound financing" (Br. p. 17), so that the Commission was entirely free to approve the transaction without considering the section 7 and section 5 issues. While the Commission's order was silent as to the scope of section 20a(2), and while counsel for the Commission did not endorse REA's argument in the lower court,[2] we argued the issue fully because an essential premise of our impeachment of the order was that an ingredient of the "public interest" and "lawful object" standards of section 20a(2) was the probable anticompetitive impact of a proposed stock acquisition.

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[1] We sometimes in this Reply refer to the United States and the Commission collectively as the "Government."

[2] In the lower court, the United States neither supported nor opposed the Commission.

The lower court did not accept REA's contention that section 20a(2) deals only with fiscal matters. Rather, the court held that "the principles announced in *Seaboard* [*Air Line R. Co.* v. *United States*, 382 U.S. 154] as applicable to a §5 merger proceeding . . . apply to a §20a stock issuance proceeding" (J.S. 39). To be sure, we contended below, and urge here (J.S. 21), that the Commission's order is infirm even as measured by the *Seaboard* rule. The lower court's assertion that the Commission "has not shut its eyes to the competitive effects" of the transaction (J.S. 39) cannot make it so; as we have indicated (J.S. 21), the Commission *did* shut its eyes. And we also contended below, and urge here (J.S. 22-23), that the *Seaboard* principle does not go far enough in a section 20a(2) proceeding, because under that provision, as opposed to section 5, the Commission must strictly apply the standards of section 7 of the Clayton Act. However, in view of the lower court's rejection of the REA argument that a section 20a(2) proceeding should be confined to fiscal questions, we saw no occasion to reargue the issue in our Jurisdictional Statement.

Now, however, while REA does not renew its contention as to the scope of section 20a(2), that contention is for the first time embraced by counsel for the Government. Thus, they assert that our "reading of the statutory language seems at odds with the pattern of the Act and unwarranted by considerations of policy," and that "questions of intercarrier control and related anticompetitive consequences . . . need not be forced into the text of Section 20a" (Motion pp. 10, 11).[3]

[3] The Government apparently is not entirely comfortable with its reading of the section, for it adds, "While it may well be that in some circumstances the Commission will find it desirable and appropriate to examine these questions in advance of approving an issuance of securities, nothing in the statutory scheme requires such inquiry." Thus the Commission is to be

It perhaps would be sufficient to point out that nothing in the Commission's order suggests that it was based upon such a construction of section 20a(2). However, because of the importance of the question we summarize the considerations that demonstrate the invalidity of the Government's contention.

While doubtless it is true that a primary concern of the Congress in enacting section 20a(2) was to equip the Commission with authority to prevent fiscal manipulation, it is at the same time just as true that the Congress employed terms—"public interest" and "lawful object"—inconsistent with an intent to restrict the Commission's inquiry to that single subject. And appellees cite not a single item of legislative history evidencing a legislative purpose narrower than that reflected by the broad statutory language.

Moreover, appellees' position is quite at odds with relevant precedent. There are a number of decisions under other statutory provisions involving the question whether the term "public interest" or its equivalent, when used as a standard of administrative action, requires the agency to evaluate the impact of its action upon competition. Every such decision that we have been able to discover arrives at the same conclusion: The agency may not ignore the policies of the antitrust laws.

In the interstate commerce area, as we have already pointed out (J.S. 21), this Court has established the rule that, in determining under section 5 whether a proposed transaction is "consistent with the public inter-

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left free, in its unreviewable discretion, to consider, or not to consider, questions of probable violation of section 7. It can neither be "required" to conduct nor to forego such an inquiry. Surely neither precedent nor common sense supports conferring upon the Commission the absolute authority to expand and contract the content of the "public interest" and "lawful object" standards of the statute.

est," the Commission "must estimate the scope and appraise the effects of the curtailment of competition which will result. . . ." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 86. This Court has applied a similar rule in defining the obligation of the Federal Power Commission when passing upon merger applications under a "public convenience and necessity" standard. "Evidence of antitrust violations is plainly relevant in merger applications, for part of the content of 'public convenience and necessity' . . . is found in the laws of the United States." *California* v. *Federal Power Comm'n*, 369 U.S. 482. See also *City of Pittsburgh* v. *Federal Power Comm'n*, 237 F.2d 741, 754 (D.C. Cir. 1956) ("Although the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality, it certainly has the right to consider a congressional expression of fundamental national policy as bearing upon the question of whether a particular certificate is required by the public convenience and necessity.").

As to the Federal Communications Commission, this Court has held that, in directing the Commission to discharge its licensing authority in terms of the "public interest, convenience, or necessity," "Congress can hardly be deemed to have limited the concept of 'public interest' so as to exclude all considerations relating to monopoly and unreasonable restraint upon commerce." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224. See also *Mansfield Journal Co.* v. *Federal Communications Comm'n*, 180 F.2d 28, 33 (D.C. Cir. 1950) ("It is certainly not in the public interest that a radio station be used to achieve monopoly."); *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 94 ("There can be no doubt that competition is a relevant factor in weighing the public interest."). And the same rule governs the

Federal Maritime Board. See *Greater Baton Rouge Port Commission* v. *United States*, 287 F.2d 86, 95 (5th Cir. 1961), *cert. den.*, 368 U.S. 985.

Our argument that "public interest" as used in section 20a(2) includes a consideration of the anticompetitive features of a proposed transaction is even stronger than in the cited cases. In all of them except *McLean*, the agency in question had no authority—and no obligation—to enforce the antitrust provisions relevant to the proposed transactions, whereas the Interstate Commerce Commission is responsible for the enforcement of section 7 of the Clayton Act. Moreover, in *McLean* the Court declared an obligation on the part of the Commission to consider the anti-competitive impact of the transaction despite the fact that the Commission under section 5 could grant immunity from the antitrust laws. It would seem that, where the Commission is acting under a provision like section 20a(2) that does not empower it to grant antitrust immunity, the obligation to take the Clayton Act into account would be even clearer.

While we could marshal additional support for our position,[4] we conceive the office of motion papers as excluding a more extended discussion. What we have said, we submit, is more than enough to establish that appellees' argument

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[4] For example, Commission decisions under provisions cognate to section 20a(2) fortify our argument. Thus in applying the interlocking directorate provision of section 20a(12), 49 U.S.C. 20a(12), the Commission has considered probable anticompetitive impact and has read the provision in light of section 8 of the Clayton Act, which also deals with interlocking directorates. See *Chesapeake & O. Ry. Co. Purchase*, 271 I.C.C. 5, 43, where the Commission stated: "The policy of Congress is to be found not only in the consolidation provisions of the Interstate Commerce Act, but also in the antitrust acts." The Commission has also, in a section 20a(2) proceeding, held that the competitive bidding requirements of section 10 of the Clayton Act, 15 U.S.C. 20, are relevant, and has in consequence required competitive bidding. See *Columbia Terminals Company—Issuance of Notes*, 40 M.C.C. 288 (1945).

respecting the scope of section 20a(2) is hardly a sufficient basis for a motion for summary affirmance.

2. *The District Court's application of* Seaboard. In our Jurisdictional Statement (pp. 21-23), we contend that the lower court's decision rested in part upon a misapplication of the *Seaboard* decision. REA and Greyhound say not a word about this issue, and the Government avoids it with a rather gingerly footnote assertion that the court's discussion of *Seaboard* amounted to "somewhat ambiguous dictum" (Motion, p. 11 n. 5).

Of course, had the lower court adopted the Government's theory that competitive considerations do not fall within the compass of section 20a(2), then any discussion of *Seaboard* would have been *dictum*. But, as we have indicated, the lower court rejected that statutory analysis. The question in that court then became one of determining what standards the Commission should have applied. Appellants maintained that, since the Commission did not have the power to immunize the proposed transaction from section 7, and since the Commission was obliged to enforce section 7, the Commission was bound to measure the transaction against the standards of that provision; and appellants contended further that, so measured, the transaction should not have been approved because the record disclosed the probability of a section 7 violation whatever the outcome of the Greyhound 60-day offer.

The District Court's response was, not that we erred in our appraisal of the record, but that we erred in our contention that the Commission was strictly bound to apply section 7 in a section 20a(2) proceeding. Rather, the court held, the governing principle was that of *Seaboard*, under which the Commission may approve a transaction "notwithstanding a potential violation of the antitrust laws if it makes adequate findings, after weighing the effects of the curtailment of competition against the advantages of

improved service, that the merger would be consistent with the public interest . . ." (Op., J.S. 38-39). Moreover, the court concluded that the *Seaboard* rule was flexible enough to permit the Commission in the case at bar to approve the transaction without making *any* appraisal of its competitive impact.

This analysis of *Seaboard* by the lower court, thus, is neither "somewhat ambiguous" nor "dictum." And summary affirmance by this Court would surely be regarded by the lower courts and the Commission as establishing both that in a section 20a(2) proceeding the Commission need not apply section 7 standards and also that, in either a section 20a(2) *or* a section 5 proceeding, the Commission need not gauge the anticompetitive effect of a proposed transaction at all if for some reason the Commission believes that such an inquiry would be "premature."

3. *Impact of the Commission's order.* Appellees REA and Greyhound rest upon the argument that "[t]he only question presented by this appeal is one of procedural timing" (p. 7), and that this question is obviously insubstantial. Of course, if the Commission's order will have no effect upon appellants other than to delay for 60 days their right to secure a hearing, appellants have been misguided in pursuing this litigation. But the order will have a much more significant impact for two reasons that we have already outlined (J.S. 19-20) and as to which only the Government attempts a partial—and, as we show below, a fallacious—response.

First, it is indisputably true that, whatever the outcome of the 60-day offer and even if the Commission were to commence some sort of proceeding at the termination of that offer, the basic 20% stock transaction—together with any additional stock acquisitions made by Greyhound under the 60-day offer—will be in effect at least until the conclusion of whatever proceeding the Commission might

commence. The evidence of record, read in the light of the case law outlined in our Jurisdictional Statement (pp. 13-18), indicates that the basic 20% transaction alone would probably constitute a section 7 violation, and this is so even if dissident REA stockholders were to acquire the additional 1,000,000 shares of stock. Thus, the approval by the Commission of the stock issuance forecloses the type of prophylactic relief that this Court has viewed as the most desirable remedy in dealing with Clayton Act violations. See J.S. 20.

Such a result should not be sanctioned in the absence of compelling justification for the Commission's action, particularly in a case where, as here, the evidence respecting the anticompetitive purpose of the transaction is so unambiguous. There is no such justification in this case. As we have pointed out (J.S. 18), if the Commission thought that as an administrative matter it would be preferable to know the result of the 60-day offer before examining the section 7 question, it could readily have denied section 20a(2) approval unless the parties reformed their contract so that the offer would expire prior to the filing of a section 20a(2) application.[5]

Second, and even more important, termination of the section 20a proceeding may very well deprive appellants of any legal remedy whatever respecting the probable anticompetitive effect of the transaction, in view of the fact that

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[5] REA and Greyhound state this this would have been "unrealistic," but the only reason given is that the contract "took almost a year to negotiate" (Motion p. 6, footnote). The REA documents of record describe in some detail the contractual provisions that required extensive negotiation, but nowhere is there any intimation that anyone had any interest in whether the stockholders should decide to sell or to buy prior or subsequent to Commission action. In any event, if reformation were required in order that the Commission could comply with its statutory duty, objections of private parties would hardly be relevant. Obviously, an applicant might favor a contractual provision that enabled immediate consummation of a transaction and postponement for an indefinite period of any Commission determination of its legality under sections 5 or 7.

injunctive relief respecting a section 7 violation may not be sought against companies subject to Commission jurisdiction. 15 U.S.C. 26. If the section 20a(2) order, once affirmed by this Court, forecloses appellants from claiming before the Commission a legal right to an investigation of the anticompetitive impact of the transaction at the termination of the 60-day offer—a right that could be enforced by judicial review of the Commission's denial of a hearing—then clearly this case does not involve just a matter of "timing."

All appellees perceive this difficulty, and all attempt to deal with it by relying upon appellants' right to complain to the Commission under section 5(7) of the Interstate Commerce Act (REA, p. 8; Govt., p. 11).[6] But only the Government tries to anticipate the obvious objection that the right to a section 5 hearing might well not be adequate because the REA-Greyhound relationship might result in a violation of section 7 without Greyhound's "controlling" REA within the meaning of section 5. As to this, the Government advances its most ingenious contention—that appellants need not be "apprehensive that they will fall between two stools" because "it seems likely that a measure of inter-carrier influence sufficient to involve an undue restraint on competition would also involve sufficient control to invoke Section 5" (p. 12). Thus, the Government's

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[6] For the sake of completeness, we note that, while section 11 of the Clayton Act, 15 U.S.C. 21, empowers the Commission to investigate possible section 7 violations, no party has suggested that a private party could secure judicial review of a refusal by the Commission to act under that provision. Section 11—which also confers jurisdiction upon the Federal Trade Commission—does not authorize the filing of complaints by private parties, as do provisions such as sections 2 (discrimination), 3 (prejudice), and 5 of the Interstate Commerce Act; and there is no case law suggesting that section 11 was designed to provide a private remedy. In *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25, the Court held that section 5 of the Federal Trade Commission Act, which in terms is similar to section 11, "does not provide private persons with an administrative remedy for private wrongs."

view is that, whenever one company acquires "part of" the stock of another in circumstances establishing a violation of section 7, the first company would also have acquired "control" of the second within the meaning of section 5.

This suggestion as to the relationship of the standards of these two statutes is at odds with their language, with their legislative history, with case law, and with sound policy.

Certainly there is nothing in the language of section 7 suggesting that "control" is a necessary ingredient of a violation. Rather, the use of the "whole or any part of the stock" phrase argues against such a limitation. Nor does the legislative history or the policy of the two statutes justify importing into section 7 the standards of section 5. As the courts have noted too often to bear citation, the purpose of section 7 was "to cope with monopolistic tendencies in their incipiency." Sen. Rept. No. 1775, 81st Cong., 2d Sess. (1950). "Interference at an early stage, if possible, seems the paramount aim." *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 742 (2d Cir. 1953). Restricting the reach of section 7 to those instances where one company has acquired at least working control of another appears inconsistent with this "paramount aim."

Finally, although the issue has not been litigated in this Court, well reasoned decisions of the lower courts establish that there can be a section 7 violation in circumstances in which, even under the most liberal interpretation of section 5, it could not be said that the acquiring company had secured "control" of its competitor. The leading case perhaps is *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn. 1953). There, the defendant company had acquired about 24% of the stock of plaintiff, a competing watch manufacturer, in an effort to gain control. Opposing stockholders of plaintiff, however,

established a voting trust of a larger block of stock and thereby acquired "effective working control." *Id.*, at 312. In granting a preliminary injunction, the court, in a penetrating opinion by Judge Hincks, held that the "all or any part of the stock" language of section 7 was designed to include "not only acquisitions of a majority interest and an interest effective to carry control," but also lesser acquisitions. *Id.*, at 315. The court concluded that the provision applied where either the acquisitions "were made pursuant to a plan or purpose to obtain control the achievement of which, at the time the acquisitions were made, was reasonably probable," or where, even absent an intent to obtain control, "there was at least a purpose to obtain minority representation on the Hamilton board." *Id.*, at 314-317.[7]

An identical conclusion was reached on virtually identical facts in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957). There the defendant company had acquired about 23% of the plaintiff company's stock, but its demand to place a representative on the board had been rejected and its purpose of achieving a "closer connection" between the companies had been balked. The court, in issuing a permanent injunction, held that "[w]hen the statute prohibited the acquisition of not merely 'the whole' but also 'any part' of the stock of a competing corporation . . . the statute obviously envisioned a situation where less than control of a competing corporation might be sufficient to be a violation of this section." *Id.*, at 395. The market position of the companies, together with the continuing purpose of

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[7] The Court of Appeals, in an opinion by Judge Frank, affirmed on the first ground—that the purchases were made "for the primary purpose of obtaining such control [and] had this purpose not been frustrated by action of Hamilton's management, Benrus would successfully have carried it out" —and therefore did not consider the ground relating to board representation. 206 F. 2d 738, 740, 741 n. 3.

defendant to secure "working control" and to place a representative on the board, were held to establish a violation. The Court of Appeals affirmed on precisely those grounds. 259 F. 2d 524 (2d Cir. 1958). For a third decision substantially the same as *Hamilton Watch* and *American Crystal Sugar*, see *Briggs Manufacturing Company* v. *Crane Co.*, 185 F. Supp. 177 (E.D. Mich. 1960), *aff'd*, 280 F. 2d 747 (6th Cir. 1960).

In sum, it is clear that, if the decision below is affirmed, appellants may well "fall between two stools," for they may be unable to persuade either Commission or court that Greyhound, at the expiration of the 60-day offer, has acquired "control" of REA, and yet there probably will be a section 7 violation. Of course, if Greyhound acquires enough additional shares to bring it reasonably near majority control, this foreclosure of relief would not occur. But, according to REA and Greyhound (Motion p. 5), "the more likely outcome is that one or more of REA's present stockholders (including appellant railroads) will purchase any tendered stock, leaving Greyhound's holdings unchanged." While in such circumstances, as we have indicated (J.S. 16-17) and as the cases cited above establish, the evidence of a section 7 violation would still be very strong, it would indisputably be much more difficult—and impossible if a unified group of railroads acquired the entire 1,000,000 shares—to establish that Greyhound "controlled" REA.

4. *Definition of market.* REA and Greyhound in their Motion (p. 9) attempt to cast some doubt upon the importance of the section 7 question. It should be sufficient to note that neither the District Court nor any appellee has taken the position that the Commission rested its order upon a determination that the transaction would not involve a section 7 violation, and that the Motion of the United States and the Commission does not suggest that the section 7 question is not significant. The United States

hardly could, for it alleged before the Commission that "the application places before the Commission serious questions under section 7 of the Clayton Act which by virtue of section 11 thereof the Commission has a duty to enforce" (Petition p. 3).

The REA-Greyhound assertions about definition of the express market are quite insubstantial. Thus, for example, in the hearings referred to by those appellees to support the contention that the Post Office Department is a principal competitor in the express market, the President of REA testified that REA, "the final embodiment of a once widespread express industry," is "the only remaining express company of over 100 which were in existence some decades ago," and that "there is a tremendous difference between our business and the business of UPS [United Parcel Service] and parcel post." And in those same hearings the Chairman of the Interstate Commerce Commission characterized REA as "the largest transporter of express and small shipments."[8]

We recognize, of course, that no final conclusion as to market control can be made absent a hearing. However, surely a *prima facie* showing of the distinctiveness of the express market arises from the fact that, as we have pointed

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[8] Hearings before the Subcommittee on Postal Rates of the Committee on Post Office and Civil Service on H.R. 12367, pp. 234, 238, 242, 468, 472.

It also may be noted that a Vice President of Greyhound, speaking for all intercity bus carriers, underscored the critical importance of express traffic to the bus companies. "For over 20 years the intercity bus industry has been supplying a steadily increasing volume of expedited package express service, which currently accounts for about 10 percent of the total revenues of the carriers. The intercity bus industry furnishes the only means of public line-haul transport for hundreds of communities which, for economic reasons, the railroads and airlines do not serve . . . . *Much of this essential service provided by buslines particularly that for smaller communities, is noncompensatory and could not possibly be continued were it not for supplementary revenues derived from such services as package express.*" (Emphasis supplied.) *Id.*, at p. 442. This indicates appellant motorbus carriers do not exaggerate the damage that may be done to motorbus competition—and motorbus service—by consummation of the REA-Greyhound transaction (J.S. p. 20).

out (J.S. 14), "[t]he Commission has consistently recognized certain fundamental differences between express service and ordinary freight service." *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131, 135 (1952). Since the Commission considers express service as sufficiently distinctive to issue certificates in terms of express carriage and to forbid both REA and motor carriers whose certificates limit them to express service from engaging in non-express carriage,[9] it is hardly unreasonable to conclude that there is probably a separate market for that type of service.[10]

5. *Raising of the section 7 question before the Commission.* The Government, noting that the Justice Department did not petition the Commission for reconsideration, also asserts that "the Clayton Act issue was not urged in any of the petitions filed by the other parties" (p. 6). This is incorrect. Thus, appellant ATA's Petition for Reconsideration alleged that the transaction would result in a "virtual monopoly of the country's express traffic" and would "substantially lessen competition" and hence would not be in the "public interest," and ATA accordingly prayed for a hearing to determine whether the transaction was "in

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[9] See, *e.g.*, *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131 (1952), 63 M.C.C. 573 (1955); *Railway Express Agency, Inc., Extension—Nashua, N.H.*, 91 M.C.C. 311 (1962), *aff'd sub nom. Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328, 332, *aff'd*, 376 U.S. 514; *Mistletoe Exp. Service Extension—Texas*, 61 M.C.C. 737, 744-745 (1953); *Railway Express Agency, Inc.—Durant-Kosciusko*, 34 M.C.C. 111, 114 (1942); *Railway Express Agency, Inc., Ext.—West Unity-Middletown*, 31 M.C.C. 363, 371 (1941).

[10] In a footnote (p. 9), REA states that, in its Answer to Southern Pacific's section 5(7) complaint before the Commission, REA alleged that, considering the market as extending to all small packages, it handled only 2% of the business, and Greyhound less than 1%; and REA states further that this allegation was not controverted. Putting aside the fact that this allegation was not made in the section 20a(2) papers or in answer to the Government's section 11 petition, where it would have been relevant, the fact is that Commission Rule 1.36(b) (49 C.F.R. 1.36(b)) forbids replications to an answer so that a denial could not have been filed.

conformity with the requirements of sections 20a, 214, and 5 of the Act, Congress' national transportation policy, and section 7 of the Clayton Act" (pp. 6, 9). As for the petitions of other appellants, the United States now reads them differently than it did before the Commission, where it stated that the protests were "tantamount to allegations that the effects of the proposed transaction may be substantially to lessen competition or to tend to create a monopoly" (Petition, p. 3).

Moreover, the point is quite irrelevant. Putting aside pleadings of others, the United States and REA argued the section 7 issue,[11] and it was passed upon by the Commission. In these circumstances, it is established that any party can secure judicial review of the issue. *Hennesey* v. *SEC*, 285 F.2d 511, 515 (3d Cir. 1961); *Wilson & Co.* v. *United States*, 335 F.2d 788, 794 (7th Cir. 1964).

6. *The section 5 question.* Appellees' arguments about the section 5 issue have been dealt with adequately in our Jurisdictional Statement. While it is true that appellants may in the future raise the section 5 question—as opposed to the section 7 issue—in a complaint under section 5(7), the Commission nonetheless should not have sanctioned as in the "public interest" a transaction that may well run afoul of section 5(4) without settling that question. If it wished to have all uncertainties resolved before holding a hearing, it should have refused section 20a(2) approval unless the parties reformed their contract so that the 60-day offer would expire prior to Commission approval.

7. *Fatal ambiguity of the order.* In our Jurisdictional Statement (pp. 24-27), we described the failure of the Commission's order to disclose clearly the grounds upon which it was based. The Government does not respond at all, and

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[11] In addition to the Petition of the United States, see REA's Reply to all Protests, pp. 3, 9-12, and Reply to all Petitions for Reconsideration, pp. 8-13.

REA and Greyhound reply simply that the order "was not in any respect ambiguous"—which presumably means that one can see "by a quick reading" that it is based, as the District Court thought and as REA and Greyhound agree, upon the uncertainties created by the 60-day offer (Motion p. 10). But if this is so, it is rather surprising to find the Government defending the order in part upon a construction of section 20a(2) that would exclude anticompetitive considerations. Government counsel presumably believe that this can be read into the order, since of course they are well aware that "the courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168.

In truth, there is no way of telling whether the Commission's action was based upon a limited reading of section 20a(2), upon a desire to await the outcome of the 60-day offer, upon a desire to await the consummation of particular working arrangements between REA and Greyhound, upon a feeling that the record did not disclose a section 7 violation, upon a conviction that even if it did the Commission could immunize the parties, or upon a wholly unrelated ground. In sum, this is a case in which the Commission has "shelter[ed] behind uncritical generalities or such looseness of expression as to make it essentially impossible for [the court] to determine what really lay behind the conclusions." *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 81. The violation of the *Chenery* rule is so palpable, and the rule itself so well established, that as to this issue summary reversal would, we suggest, be quite in order.

Conclusion

The considerations central to disposition of appellees' motions are clear: Two mammoth business enterprises, each dominant in its own field, propose entering into a stock and management relationship designed to achieve coordination

of their efforts in the area in which their activities overlap. The Commission has approved that arrangement as in the "public interest" and " for a lawful object" without considering whether it would violate section 7 of the Clayton Act, despite the fact that the Commission has been charged with the responsibility of enforcing that Act and that the protesting private parties are not free to bring independent section 7 suits. Unless the Commission in the future concludes that Greyhound has acquired control of REA—which REA and Greyhound say is not a likely outcome of the Greyhound stock purchase offer—termination of the section 20a(2) proceeding will permanently deprive appellants of any remedy against the apparent section 7 violation. Appellees seek termination of that proceeding by summary affirmance by this Court. That effort should not succeed. The motions should be denied.

Respectfully submitted,

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